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No. 91-236

In The

Supreme Court of the United States

October Term, 1991

PAMELA MUHAMMAD, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,

Petitioners,

vs.

STRASSBURGER, MCKENNA, MESSER, SHILOBOD AND GUTNICK, a law partnership; HOWARD MESSER and JAMES THOMAS, JR.,

Respondents.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the decision of the Pennsylvania Supreme Court disallowing negligence or breach of contract suits against the Petitioner's lawyer after a voluntary settlement, and limiting said claims to fraud, violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

2. Did the decision of the Pennsylvania Supreme Court refusing to permit the Petitioner leave to file a Fourth Amended Complaint or finding that the Petitioner had not pled a fraud claim with sufficient specificity deny the Petitioner her Due Process rights under the Fourteenth Amendment of the United States Constitution?

PARTIES IN THE COURT BELOW

Pamela Muhammad, Administratrix of the Estate of NAZIR MUHAMMAD and ABDULLAH MUHAMMAD,

Plaintiff

vs.

STRASSBURGER, MCKENNA, MESSER, SHILOBOD AND GUTNICK, a law partnership; HOWARD MESSER and JAMES THOMAS, JR.

Defendants

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The Order and Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania, dismissing the Second Amended Complaint of Petitioners is not reported and is reproduced in the Appendix to Petitioners' Petition for Writ of Certiorari at pages A-51 to A-62. The Superior Court of Pennsylvania's decision reversing the Court of Common Pleas of Allegheny County, Pennsylvania with opinion is reported at 374 Pa. Super. 613, 543 A.2d 1138 (1988). The decision and opinion of the Supreme Court of Pennsylvania reversing the Superior Court of Pennsylvania and reinstating the Order of the Court of Common Pleas of Allegheny County Pennsylvania dismissing the Second Amended Complaint with Opinion is reported at ___ Pa. ___, 587 S.2d 1346 (1991).

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Section I – United States Constitution

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioners, Pamela and Abdullah Muhammad, filed the instant action April 19, 1984 by praecipe. The Complaint in this matter was not filed until April 2, 1986, almost two years after the Praecipe. In response to the Respondents' timely preliminary objections, Petitioners filed an Amended Complaint. After Respondents' Second Preliminary Objections were filed restating their original objections and raising new challenges to the Petitioners' Amended Complaint, the Petitioners filed a Second Amended Complaint.

The Second Amended Complaint (hereinafter "Complaint") contained eight counts alleging wrongful conduct. The Complaint sets forth the following factual allegations. Pamela Muhammad is the mother of a deceased baby boy, Nazir Muhammad. She is also the administratrix of the estate of Nazir Muhammad. The Complaint further alleges that the defendant lawyers and law firm represented Pamela Muhammad and her then husband, Abdullah Muhammad in a medical malpractice civil action before the Court of Common Pleas of Allegheny County, Pennsylvania.

The Complaint alleges that an incomplete circumcision was performed on the infant shortly after his birth at McGee Women's Hospital. About 4 weeks later the deceased was admitted to Children's Hospital for a second circumcision because his parents were apparently dissatisfied with the first circumcision. It is alleged in the Complaint that, as a consequence of drugs administered in preparation for general anesthesia, Nazir Muhammad suffered a pulmonary edema and died on December 19, 1977, then being about 4 weeks of age. In April of 1979 an action was filed against

various medical providers in the Court of Common Pleas of Allegheny County, Pennsylvania.

The Complaint further pleads that the medical malpractice case was settled for $26,500. The settlement was achieved as a result of pretrial conciliation before Judge Martin I. Wekselman of the Court of Common Pleas of Allegheny County, Pennsylvania, wherein the Petitioners agreed to accept the settlement offer in the amount recommended by Judge Wekselman of $26,500.00.

The Petitioners thereafter became dissatisfied with settlement to which they agreed and attempted to have the Court prevent enforcement of the settlement. The Petitioner contested the adequacy of the amount of settlement, the unfairness used to obtain it, and the quality of representation provided by her attorneys. At the hearing before Judge Martin I. Wekselman, Mrs. Muhammad testified,

> "Well, I felt that the amount was unfair, and that whatever was arrived at was arrived at by unjust means. You know, $26,500 is not enough for the loss of a child. It seems like even my defense counsel was in agreement with it, you know. It was like as if, you know, I would commit a crime for bringing this suit against the hospital and the doctors involved. I feel like I am being represented poorly, even by my own attorney."

After a hearing on the Petition to Enforce the settlement, the Court by Order dated April 23, 1982 confirmed the settlement.

In November, 1984, the Superior Court of Pennsylvania affirmed the enforcement of the settlement. Before the

Superior Court of Pennsylvania, the Petitioners raised numerous challenges to the settlement including lack of consent, improper procedures for enforcement of the settlement, and lack of counsel at the hearing before Judge Martin. I. Wekselman.[1]

The thrust of the Complaint is that the failure to include other defendants decreased the size of the settlement Petitioners were able to obtain. The Petitioners assert that a drug manufacturer and other doctors and another hospital could have been sued. In each Count of the Complaint (except the emotional distress claim) Petitioners pled that if something different had been done, the Petitioners could have achieved a settlement or verdict in excess of the amount of the settlement that was achieved and the other defendants would have made the case "worth more".

The Second Amended Complaint corrected some of the pleading and procedural errors of the Complaint and Amended Complaint, but failed to correct the fatal defects raised in the Respondents' Third Preliminary Objections. The Court of Common Pleas of Allegheny County, Pennsylvania granted Respondents' demurrer and entered judgment in favor of Respondents. The Superior Court reversed the granting of the demurrer and remanded for further proceedings. A Petition for Allowance of Appeal was filed in response to the order of the Superior Court reversing the granting of the demurrer by the lower Court in the Supreme Court of Pennsylvania.

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[1] The Superior Court of Pennsylvania affirmed the settlement in a Memorandum Opinion. *Muhammad v. Children's Hospital of Pittsburgh*, (No. 601 Pgh 1982, November, 1984).

The Petition for Allowance of Appeal was granted by the Pennsylvania Supreme Court and on March 15, 1991 the Supreme Court of Pennsylvania reversed the Superior Court and reinstated the Order of the Court of Common Pleas of Allegheny County dismissing the Second amended Complaint.

In dismissing the Complaint, the Supreme Court of Pennsylvania determined that as a matter of public policy in Pennsylvania lawsuits in contract or negligence could not be maintained by dissatisfied plaintiffs against their attorneys after a voluntary settlement. The Supreme Court of Pennsylvania allowed claims based on fraud in procuring the settlement. A plaintiff was required to plead that his attorney committed fraud in procuring the settlement and must plead the fraud with specificity as required under the Pennsylvania Rules of Civil Procedure. Finding that the Petitioners had not pled a claim for fraud and could not do so, the Supreme Court of Pennsylvania reinstated the Order of the Court of Common Pleas of Allegheny County dismissing the Second Amended Complaint. The Petitioners were given three opportunities to plead a claim for fraud and the Supreme Court of Pennsylvania determined that based on the record before them and the opportunities provided to the Petitioners, no claim for fraud could be pled against the Respondents.

SUMMARY OF THE ARGUMENT

The decision of the Supreme Court of Pennsylvania limiting the remedies available to a dissatisfied plaintiff

after a voluntary settlement does not raise any constitutional question. The decision is not wholly arbitrary or irrational and therefore is left to the discretion of the states in administering its own tort law. This is not a case involving denial of access to the Courts. The plaintiff filed a medical malpractice suit which was voluntarily settled. She then subsequently filed a legal malpractice action which is the present matter before this Honorable Court. This case does not involve denial of access to the Court, but is simply a petition by a dissatisfied litigant with the results achieved.

The determination of whether the plaintiff has alleged a fraudulent claim is a matter of state law and the decision of the Supreme Court of Pennsylvania is binding upon this Court. Furthermore, the decision not to give the plaintiff a fourth opportunity to file a complaint setting forth a claim for fraud does not raise a constitutional question.

The decision of the Pennsylvania Supreme Court is a question of state law. This decision does not violate any constitutional protection and therefore no federal question is raised.

ARGUMENT

I. THE DECISION OF THE PENNSYLVANIA SUPREME COURT DISALLOWING NEGLIGENCE OR BREACH OF CONTRACT SUITS AGAINST A PLAINTIFF'S LAWYER AFTER A VOLUNTARY SETTLEMENT, AND LIMITING THOSE CLAIMS TO FRAUD, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The decision of the Pennsylvania Supreme Court does not violate any constitutional protection under the Fourteenth Amendment. The Pennsylvania Supreme Court decision was a determination of the parameters of a suit that could be brought against an attorney for malpractice after the voluntary settlement of an underlying case.

The Supreme Court of Pennsylvania's decision was grounded upon sound public policy. The Pennsylvania Supreme Court declined to allow breach of contract and negligence suits against lawyers after a voluntary settlement since to allow these types of suits would create chaos in the civil litigation system.

> "The primary reason we decided today to disallow negligence or breach of contract suits against lawyers after a settlement has been negotiated by the attorneys and accepted by the clients is that to allow them would create chaos in our civil litigation system. Lawyers would be reluctant to settle a case for fear of some enterprising attorney representing a disgruntled client could find a way to sue them for something that 'could have been done, but was not.' We

> refuse to endorse a rule that will discourage settlements and increase substantially the number of legal malpractice cases. A long-standing principal of our courts has been to encourage settlements; we will not act so as to discourage them."

Muhammad v. Strassburger, et al., ___ Pa. ___, 587 A.2d 1346, 1349 (1991).

In *Martinez v. California*, 444 U.S. 277, 100 S. Ct. 553, 62 L.E. 2d 481 (1979) this Court considered the role of the U.S. Constitution and the federal courts in a state's determination of its tort law. In *Martinez v. California, supra*, the plaintiff challenged a state law granting immunity to state workers involved in parole and probation decisions. This Court unanimously rejected a due process challenge to the immunity afforded by the State of California.

> "But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort is paramount to any discernible federal interest, except perhaps an interest of protecting the individual citizen from state action that is wholly arbitrary or irrational."

Martinez v. California, 444 U.S. at 282.

Clearly, the decision of the Supreme Court of Pennsylvania in setting the parameters of its tort law in legal malpractice action is not wholly arbitrary or irrational. It clearly furthers the sound public policy of promoting settlements and the finality of civil litigation; A policy that Federal Courts have also supported. *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2nd Cir. 1983);

Insurance Concepts, Inc. v. Western Life Insurance Company, 639 F. 2d 1108 (5th Cir. 1981); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980); *Pearson v. Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), *cert. denied, Skydell v. Ecological Science Corp.*, 425 U.S. 912, 96 S. Ct. 1508 (1976).

If the Petitioner is arguing that she has been deprived access to the Courts, or a meaningful opportunity to appear, this argument is without merit. The Petitioner was provided access to the Pennsylvania courts to file a medical malpractice action which was voluntarily settled. The plaintiff was also provided access to the Courts to file the legal malpractice action that is presently before this Court on the Petitioner's Petition for Certiorari. A litigant who is merely unhappy with the results cannot raise a due process claim claiming lack of access to the courts. Clearly, the Petitioner has not raised a valid challenge that she has been denied access to the courts of Pennsylvania.

It would also appear that in raising her due process claim, the petitioner has not set forth any interest which is being deprived without due process of law. As this Court noted in *Martinez*, the right to bring a tort action based on an injury is not a clear property interest. However, even if a property or other interest protected by the Fourteenth Amendment was found, the petitioner has not been deprived of any interest without due process of law. She had the right to file her suit and was given every opportunity to convince the courts of Pennsylvania that under Pennsylvania tort law she could successfully bring a suit against her attorneys.

The Pennsylvania Supreme Court set forth a second basis for dismissal of the Complaint. In footnote 13 of its Opinion, the Court also found that the petitioner had set forth no harm suffered as a result of the settlement. The Court determined that the harm suffered was so speculative that it would not allow a contract or tort claim to proceed. Consequently, there is an independent basis under state law for dismissal of the action, the failure to allege a recoverable harm.

II. THE PENNSYLVANIA SUPREME COURT DID NOT DENY THE PETITIONER DUE PROCESS BY REFUSING HER A FOURTH OPPORTUNITY TO PLEAD A FRAUD CLAIM AGAINST RESPONDENTS OR FINDING THAT THE PETITIONER'S SECOND AMENDED COMPLAINT DID NOT CONTAIN A SUFFICIENTLY PLED FRAUD COUNT.

The decision of whether to permit the petitioner to file a fourth amended Complaint is a question of state law. There is no constitutional right to have an indefinite opportunity to plead a claim under Pennsylvania tort law. There is no requirement that a plaintiff be given an unlimited opportunity to plead a claim. The Pennsylvania Courts are granted discretion in determining when a plaintiff should be given additional opportunities to plead a claim against a defendant. *See e.g. Nationwide Mutual Insurance Company v. Barbera*, 443 Pa. 93, 277 A.2d 827 (1971).

Under Pennsylvania Rule of Civil Procedure 1028(c), the Petitioner had an opportunity to file a Third

Amended Complaint after the Respondents filed Preliminary Objections to the Petitioners' Second Amended Complaint. The petitioner chose not to file an Amended Complaint at that time but to rest on her pleadings. She should not now complain that she has been denied an opportunity to plead her cause of action.

The question whether the petitioner has pled sufficient facts to support a fraud claim is clearly a matter of state law. The decision of the Pennsylvania Supreme Court on questions of state law are final and binding on this Court. *Hortonville Joint School District No. 1, et al. v. Hortonville Education Association, et al.*, 426 U.S. 482, 96 S. Ct. 2308, 49 L. E. 2d 1 (1976); *Groppi v. Wisconsin*, 400 U.S. 505, 91 S. Ct. 490, 27 L. E. 2d 57 (1971).

CONCLUSION

For the foregoing reasons, Respondent contends that the instant case presents no question of federal law. The decision of the Pennsylvania Supreme Court on the parameters of its tort law does not raise any constitutional questions. Respondent requests that this action be concluded and that this Petition for Writ of Certiorari be denied.

Respectfully submitted,

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